

A **LNE NETWORK SYSTEMS (ASIA) SDN BHD v.
LOI CHEW PING & ORS**
HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN JC
[CIVIL SUIT NO: 22NCVC-43-01-2014]
B 24 FEBRUARY 2015

C **CIVIL PROCEDURE:** Cause of action – Claim for liability – Siphoning of funds – Breach of trust – Knowing receipt – Whether recipient’s state of knowledge must be such as to make it unconscionable to retain benefit of receipt – Whether there was beneficial receipt by second defendant of plaintiff’s money – Whether second defendant was in knowing receipt of money belonging to plaintiff that had been transferred in breach of trust – Whether second defendant’s conduct was dishonest – Whether second and fourth defendants liable to account to plaintiff as constructive trustee for having knowingly received sums belonging to plaintiff
D **CIVIL PROCEDURE:** Cause of action – Claim for liability – Fraud – Conspiracy to defraud – Siphoning of funds – Whether there was an agreement between second defendant and fourth defendant to siphon funds of plaintiff – Whether evidence showed third defendant involved in fraud – Whether second and fourth defendants liable for conspiracy to defraud plaintiff – Whether second and fourth defendants
E liable to account to plaintiff as constructive trustee for having knowingly received sums belonging to plaintiff

The plaintiff, a company involved in the business of manufacturing electrical engineering appliances, had employed the first defendant (‘D1’) as its accounts executive. The gist of the plaintiff’s case was that D1 had, through
F fictitious invoices, caused the plaintiff to issue cheques to the second defendant (‘D2’) and the third defendant (‘D3’), totalling RM817,372.72. The plaintiff commenced this action against D1, D2 and D3 for, *inter alia*, the recovery of such sums. The fourth defendant (‘D4’) was subsequently
G joined as co-defendant on the application of D2 and D3. D1 and D4 did not enter appearance before this court and accordingly judgment was entered against them. D1 was charged for, and convicted of, criminal breach of trust arising from her acts that were the subject matter of the action before this court, and was sentenced to imprisonment for a term of 42 months. Briefly, the facts were that D1 had begun embezzling the funds of the plaintiff on
H 16 April 2013, barely two weeks after commencing employment with the plaintiff, by raising fictitious invoices when the managing director and shareholder of the plaintiff, one Mark Rampling, was travelling on business and away from the office. It transpired that not all such cheques were made out to genuine suppliers or creditors. Some of these cheques were made out
I to WTL marketing, a sole proprietorship registered in the name of D2, and QX Marketing, a sole proprietorship registered in the name of D3. The connection between D1 on the one hand, and D2 and D3 on the other, was through D4, who was an acquaintance of D1. Based on the evidence at trial,

D1 would inform D4 that a cheque had been issued. Once the cheque was cleared, the money would be withdrawn by D4 from the WTL Marketing account and a cheque signed by D2 would be drawn on the WTL Marketing account. The “account payee only” endorsement would be cancelled, which permitted D4 to withdraw cash, so long as the cheque was presented at the home branch of the accountholder, in this case CIMB Bank. A single cheque was also issued in favour of QX Marketing, the sole proprietorship registered by D3. The issues that arose for determination were (i) whether the state of knowledge of each of D2 and D3 was such as to make it unconscionable for her to retain the benefit of the receipt; (ii) whether either or both of D2 and D3 had conspired with D1 and/or D4 to defraud the plaintiff of its money and (iii) whether D2 ought to be made liable for the acts of her employee, D4, on the principle of vicarious liability.

Held (allowing plaintiff’s claims against D1, D2 and D4; dismissing plaintiff’s claims against D3):

- (1) The two causes of action in equity are knowing receipt and dishonest assistance, liability for both which is fault based. In the case of knowing receipt, the recipient’s state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt. In order to establish accessory liability in a case of dishonest assistance, the essential ingredient is dishonesty, or conscious impropriety. While it was not disputed that D2 had received money that was traceable to the plaintiff, the question that arose was whether D2 had received such money in a beneficial capacity, or whether she was merely a conduit through whom D1 routed the money. The distinction is significant because if D2 had not received the money beneficially, but merely in a ministerial capacity, the plaintiff would need to prove dishonesty on the part of D2, which is a higher standard of fault, and establish liability for dishonest assistance of a breach of trust. On the facts, there was beneficial receipt by D2 of the plaintiff’s money. (paras 39, 41 & 42)
- (2) D2 by her own evidence described the scheme as “illegal”, “tantamount to embezzlement of funds”, “money laundering” and a “scam”. She considered what D1 and D4 were doing as an unlawful enterprise, and she had permitted her account to be used not once, not twice but a total of eighteen times. While she maintained that she had each time demanded D4 to desist, but the reality was that the scheme continued unabated until it was finally unravelled. On this basis, the conduct of D2 was unconscionable and D2 was in knowing receipt of money belonging to the plaintiff that had been transferred to her in breach of trust. D2’s conduct was nonetheless dishonest rendering her liable to account for the plaintiff’s money that had been transferred into her WTL Marketing account. (paras 45, 46 & 59)

- A (3) It was not disputed in evidence that a cheque for the amount of RM22,000 was paid into D3's account in the name of QX Marketing. However, this money had been returned to the plaintiff on 19 December 2013. Accordingly, there was no question of D3 being a constructive trustee for the amount of RM22,000. There was no longer any property of the plaintiff that was in the possession of D3 that could be made the subject of a trust. There was no evidence that D3 had dishonestly assisted in the breach of trust relating to the amount of RM795,372.72. Even though D3's QX Marketing account was used for the purpose of receiving the money that was paid through the 13 December 2013 cheque, this fact was not relevant for the purposes of determining liability in respect of the said amount of RM795,372.72. Indeed, there was no evidence that D3 was even involved in the prior fraud involving D2's WTL Marketing account. (paras 61, 64 & 66)
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- C
- D (4) The inconsistencies in D2's testimony had led to the inescapable conclusion that there must have been an agreement between D2 and D4 to use the WTL Marketing account in order to siphon away funds of the plaintiff. D2 had written 27 cheques in favour of D4. D4's testimony was similarly unreliable. The reality was that the money was withdrawn in cash not to pay a bankrupt supplier as alleged by D4, but as a means of breaking the money trail and to aid the dissipation of the plaintiff's money. D2 had conspired with D4 to defraud the plaintiff. The plaintiff had not proven its case against D3 for conspiracy to defraud beyond reasonable doubt. (paras 71, 72 & 76)
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Case(s) referred to:

- F *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case* [1995] 3 CLJ 639 CA (*refd*)
BCCI (Overseas) Ltd v. Akindele [2001] Ch 437 CA (*refd*)
El Ajou v. Dollar Land Holdings plc [1994] 2 All ER 685 (*refd*)
Leakey & Ors v. National Trust [1980] QB 485 (*refd*)
Lipkin Gorman v. Karpnale [1991] 2 AC 548 (*refd*)
- G *New Kok Ann Realty Sdn Bhd v. Development & Commercial Bank Ltd New Hebrides (In Liquidation)* [1986] 1 LNS 30 SC (*refd*)
Ooi Meng Khin v. Amanah Scotts Properties (KL) Sdn Bhd & Another Appeal [2014] 1 LNS 719 CA (*dist*)
Orton v. Butler (1822) 5 B & Ald 652 (*refd*)
Royal Brunei Airlines v. Tan [1995] 2 AC 378 PC (*refd*)
- H *Simmah Timber Industries Sdn Bhd v. David Low See Keat & Ors* [1999] 5 MLJ 421
Twinsectra Ltd v. Yardley [2002] 2 AC 164 (*refd*)
Uzinterimpex JSC v. Standard Bank plc [2008] Bus LR 1762 (*refd*)
Wisma Punca Emas Sdn Bhd v. Dr Donal R O'Holohan [1986] 1 LNS 46 SC (*refd*)

Legislation referred to:

- I Civil Law Act 1956, s. 3(1)

For the plaintiff - Joachim Maria (Peter Bernard with him); M/s Maria & Assocs
For the 2nd & 3rd defendants - Aliza Abdul Samad (Nurul Zawani Mohd Abdul Rahim
with her); M/s HY Mah & Assocs

Reported by Suhainah Wahiduddin

JUDGMENT

Azizul Azmi Adnan JC:

Introduction

[1] The plaintiff, LNE Network Systems (Asia) Sdn Bhd, is a company involved in the business of manufacturing lighting equipment, air-conditioning accessories and other electrical engineering appliances. The plaintiff employed the first defendant, Loi Chew Ping, as its accounts executive. The first to fourth defendants are referred to in this judgment as D1, D2, D3 and D4 respectively.

[2] The gist of the plaintiff's case is that D1 had, through fictitious invoices, caused the plaintiff to issue cheques to D2 and D3, totalling RM817,372.72. The plaintiff commenced this action against the D1, D2 and D3 for, *inter alia*, the recovery of such sums. D4 was subsequently joined as a co-defendant on the application of D2 and D3.

[3] D1 and D4 did not enter any appearance before this court, and I accordingly enter judgment against them.

[4] D1 was charged for, and convicted of, criminal breach of trust arising from her acts that are the subject matter of the action before this court, and on 30 September 2014 was sentenced to imprisonment for a term of 42 months.

Salient Facts

[5] D1 commenced employment with the plaintiff on 1 April 2013, after answering an advertisement for the position of accounts executive. She proved to be a capable employee, demonstrating proficiency in accounting-related matters. In a matter of a few short weeks, she had gained the trust of the employer.

[6] This trust was sadly misplaced, for D1 began embezzling the funds of the plaintiff on 16 April 2013, barely two weeks after commencing employment with the plaintiff. This she achieved by raising fictitious invoices when the managing director and shareholder of the plaintiff, Mr Mark Rampling, was travelling on business and away from the office.

[7] At the material time, there were three directors in the plaintiff company: Mr Rampling, his wife, and a non-executive director, Mr Stephen Koh. The authorised signatories for cheques issued by the companies were any two directors. The plaintiff had adopted a practice of getting Mrs

- A Rampling to pre-sign all the cheques in a chequebook. When it became necessary to issue a cheque, all the paperwork was put in order by D1, who then obtained Mr Rampling's countersignature on the cheque. When Mr Rampling was away, Mr Koh would sign in his stead. Being a non-executive director, Mr Koh was not entirely familiar with the day-to-day affairs of the plaintiff and would unquestioningly sign the cheques prepared by D1.

[8] It transpired that not all such cheques were made out to genuine suppliers or creditors. Beginning in April 2013, 19 cheques were issued to D2 and D3.

- C [9] Eighteen of these cheques were made out to WTL Marketing, a sole proprietorship registered in the name of D2. One cheque was issued to QX Marketing, a sole proprietorship registered in the name of D3.

- D [10] The connection between D1 on the one hand, and D2 and D3 on the other, was through D4. D4 was an acquaintance of D1 who lived in the same apartment complex as she did. D2 was the sister to D4's husband. In addition to being her sister-in-law, D4 was also an employee of WTL Marketing, the sole proprietorship owned by D2.

[11] D3 was D4's daughter.

- E [12] Based on the evidence at trial, D1 would inform D4 that a cheque had been issued. On occasion, the plaintiff's bank would verify the issuance of cheque by calling the cheque verifier designated by the plaintiff, which unfortunately was D1.

- F [13] Once the cheque cleared, the money would be withdrawn by D4 from the WTL Marketing account. A cheque signed by D2 would be drawn on the WTL Marketing account. The "account payee only" endorsement would be cancelled, which permitted D4 to withdraw cash, so long as the cheque was presented at the home branch of the accountholder, in this case the CIMB Bank located in Bandar Sri Damansara.

- G [14] A single cheque was issued in favour of QX Marketing, the sole proprietorship registered by D3. This cheque would prove to be undoing of D1, as we shall see later.

[15] In addition to the 19 cheques, the plaintiff also claimed that RM37,635.51 was missing from the plaintiff's petty cash.

H **Issues**

[16] The plaintiff's statement of claim contained a number of different causes of action. These are summarised in the following table, to show the claims in respect of each of the defendants.

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Causes of Action	D1	D2	D3	D4
Tort of conversion		X		

Unjust enrichment/ Money had and received		X	X	
Knowing receipt/ Constructive trust		X	X	X
Conspiracy to defraud	X	X	X	X
Vicarious liability		X		
Breach of duties as an employee	X			
Breach of trust/ fiduciary duties	X			

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[17] In the course of submissions, I reframed the issues to be determined by reference to the specific causes of action. A brief discussion of each is set out in the following paragraphs. It will be necessary in some cases for me to briefly consider the law relating to these causes of action, in as far as they relate to the elements that the plaintiff will need to prove in order to succeed in that particular cause of action.

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Conversion

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[18] The plaintiff claimed against D2 the wrongful conversion of its money. The tort of conversion does not lie in an action for money, taken and received as currency. An action for conversion may only be used to recover specific property, for example the specific notes or coins that have been stolen or misappropriated from a plaintiff. See *Orton v. Butler* (1822) 5 B & Ald 652 and *dicta* of Lord Templeman in the House of Lords decision of *Lipkin Gorman v. Karpnale*¹.

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[19] The plaintiff here is not seeking the return of specific assets, but rather the return of a sum of money equal to the amount that had been defrauded from it. Accordingly, it will not be necessary for me consider this cause of action any further.

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Unjust Enrichment/Money Had And Received

[20] The plaintiff pleaded unjust enrichment and money had and received against D2 and D3.

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[21] In the common law cause of action for money had and received, a plaintiff must show that the defendant had been unjustly enriched by reason of having received money belonging to the plaintiff. If on the other hand the defendant is able to show that he had provided consideration for the money or had otherwise changed his position, he will have a valid defence against the plaintiff.

I

A [22] In the course of the trial, it was established in evidence that:

(a) All the plaintiff's money that had been paid into D2's bank account had been withdrawn by D4; and

B (b) D3 had returned to the plaintiff the plaintiff's money that had been paid into her account.

C [23] Counsel for the plaintiff conceded in the course of submissions that, if it were proven that D2 was not involved in the fraud, the defence of change of position would have been available to her, as she would simply be an innocent conduit through whom the money was channelled. The same applies in respect of D3, who had returned the money to the plaintiff, and accordingly cannot be said to have been unjustly enriched.

D [24] On the other hand, if this court finds that either defendant was somehow involved in the fraud, then that defendant would be liable for conspiracy or as constructive trustee, both alternative causes of action pleaded by the plaintiff. This cause of action is therefore redundant, as the remedies sought by the plaintiff would be obtainable under those alternative actions, and need not detain us any further except for me to note the following.

E [25] The theoretical basis for unjust enrichment had been in doubt for some time (see for example the *dicta* of Gunn Chit Tuan J in *New Kok Ann Realty Sdn Bhd v. Development & Commercial Bank Ltd New Hebrides (In Liquidation)*², and was finally resolved by the House of Lords in *Lipkin Gorman*, which of course was decided after 7 April 1956, the cut-off date for the reception of English common law and equity into Malaysian law under the Civil Law Act 1956. Section 3(1) of the Civil Law Act 1956 limits the application of English common law and equity, in that where a matter is one for which "provision has been made or may hereafter be made by any written in force in Malaysia", then the English common law and rules of equity do not apply. The Part VI of the Contracts Act 1950 deals with non-contractual restitutionary claims. The question that therefore arises, which is a question that I am not aware has been addressed in Malaysian jurisprudence, is whether Part VI of the Contracts Act 1950 precludes the reception of the common law principles of unjust enrichment, bearing in mind that English cases have now established that unjust enrichment forms a distinct source of rights and obligations in English private law, alongside contract and tort.

H *Knowing Receipt/Constructive Trust*

I [26] While money had and received is a common law cause of action, knowing receipt is an equitable claim. One practical distinction between the two causes of action is that liability for the common law action is strict and requires no element of knowledge, whereas liability for knowing receipt requires a particular state of knowledge on the part of a defendant.

[27] In the present case, the plaintiff has pleaded knowing receipt against D2, D3 and D4. We are concerned in present instance only with D2 and D3, as D4 has not entered any defence. A

[28] The fact that both D2 and D3 had received money belonging to the plaintiff was not in dispute. The key issue is therefore whether each of the relevant defendants' state of knowledge was such as to make it unconscionable for her to retain the benefit of the receipt. B

Fraud And Conspiracy

[29] The plaintiff pleaded fraud and conspiracy against all the defendants. As neither D1 nor D4 has entered any defence, the case of fraud is taken to have been proven against them. C

[30] The question that remains is whether D2 and/or D3 had conspired with D1 and/or D4 to defraud the plaintiff.

Vicarious Liability

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[31] The plaintiff sought to make D2 liable for the fraudulent acts of D4, on the basis that D2 was the employer of D4 and ought to be liable for the acts of her employee on the principle of vicarious liability.

Breach Of Employee's Duties And Breach Of Trust And/Or Fiduciary Duties

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[32] As against D1, the plaintiff has pleaded breach of employee's duties and breach of trust and fiduciary duties. D1 did not enter any defence, and accordingly judgment is entered against D1 in favour of the plaintiff in each of these causes of action.

Issues To Be Determined

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[33] To summarise, the three issues for determination as I have reframed them are as follows:

- (a) Whether the state of knowledge of each of D2 and D3 was such as to make it unconscionable for her to retain the benefit of the receipt; G
- (b) Whether either or both of D2 and D3 had conspired with D1 and/or D4 to defraud the plaintiff of its money; and
- (c) Whether D2 ought to be made liable for the acts of her employee, D2, on the principle of vicarious liability. H

[34] In the following paragraphs, I examine each cause of action in detail and set out my findings.

Knowing Receipt

[35] A preliminary point to be addressed is the precise nature of the plaintiff's cause of action. Paragraph 45(a) of the statement of claim stated: I

- A Defendan ke-2, ke-3 dan ke-4 telah dengan sengaja dan secara tidak jujur menerima kesemua wang-wang secara salah yang dialihkan oleh Defendan Pertama daripada akaun Plaintiff.

[36] The plaintiff's stated action may be translated as "dishonest receipt". However, the equitable causes of action are in fact properly be described as "knowing receipt" and "dishonest assistance" (see para. 30-07 *et seq.* of *Snell's Equity*³). Dishonest assistance is sometimes styled as knowing assistance, although in my view the former should be preferred because of differing states of knowledge required in order to establish liability for each of these causes of action.

- C [37] I am of the view that this defect in the pleadings does not impair the plaintiff's case for the following reasons. Even though the general rule is that a party must be bound by his pleadings, the Supreme Court has held that where the cause of action was not specifically pleaded but it is clear that the facts in the statement of claim sufficiently established the claim, the cause of action is nonetheless sustainable (*Wisma Punca Emas Sdn Bhd v. Dr Donal R O'Holohan*⁴). The key guiding principle is whether the defendant was afforded sufficient opportunity to answer the case of the plaintiff, and to direct his evidence to the issues disclosed in the plaintiff's statement of claim. The formula used in the English Court of Appeal case of *Leakey & Ors v. National Trust*⁵ is whether there was conceivable prejudice to the defendant by the fact that the specific cause of action had not been set out in the statement of claim.

- F [38] I find no conceivable prejudice to the defendants in the present instance, as the evidence that they would have had to adduce would have been the same whether or not the cause of action had been properly described as knowing receipt. The differences between the equitable causes of action of knowing receipt and dishonest assistance lie in the factual circumstances of a particular case, depending on whether the defendant had been in receipt of trust property or had facilitated or procured a breach of trust without being in actual receipt of trust property.

G **The Law**

[39] It is instructive to begin with a summary of the applicable principles of law, in as far as they are relevant to the factual circumstances of this case:

- H (a) The two causes of action in equity are knowing receipt and dishonest assistance, liability for both of which is fault-based. (By contrast, the common law liability under money had and received and unjust enrichment is strict, requiring no wrongdoing on the part of the recipient of the money.)
- I (b) The requisite state of knowledge of the defendant that is necessary to found liability is slightly different under each cause of action:
- (i) In the case of knowing receipt, the recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt (See *dicta* of Nourse LJ in *BCCI (Overseas) Ltd*

*v. Akindele*⁶, applied by the Court of Appeal in *Ooi Meng Khin v. Amanah Scotts Properties (KL) Sdn Bhd & Another Appeal* [2014] 1 LNS 719; [2014] 6 MLJ 488⁷.

- (ii) In order to establish accessory liability in a case of dishonest assistance, the essential ingredient is dishonesty, or conscious impropriety. This is an objective moral standard judged in the light of what the person actually knew at the material time. In other words, it will not be open to a defendant to escape liability by simply saying that he saw no wrong in his own behaviour (*Royal Brunei Airlines v. Tan*⁸). Dishonesty requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people, although he should not escape a finding of dishonesty because he sets his own standards of honesty and does regard as dishonest what he knows would offend the normally accepted standards of honest conduct (per Lord Hutton in *Twinsectra Ltd v. Yardley*⁹).
- (c) The elements of knowing receipt were stated by Hoffmann LJ in *El Ajou v. Dollar Land Holdings plc*¹⁰:

This is a claim to enforce a constructive trust on the basis of knowing receipt. For this purpose the plaintiff must show, first, a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty.

- (d) The defence of change of position should not have any application where the cause of action is knowing receipt or dishonest assistance (unlike unjust enrichment discussed at paras. 20 to 25, *ante*), on the basis that liability for these equitable causes of action is fault-based, and therefore it should not be open to a defendant who has behaved dishonestly or unconscionably to plead that he has changed his position. This very point was considered by Nourse LJ in the *Akindele* case:

While in general it may be possible to sympathise with a tendency to subsume a further part of our law of restitution under the principles of unjust enrichment, I beg leave to doubt whether strict liability coupled with a change of position defence would be preferable to fault-based liability in many commercial transactions, for example where, as here, the receipt is of a company's funds which have been misapplied by its directors. Without having heard argument it is unwise to be dogmatic, but in such a case it would appear to be commercially unworkable and contrary to the spirit of the rule in *Royal British Bank v. Turquand* (1856) 6 E & B 327 that, simply on proof of an internal misapplication of the company's funds, the burden should shift to the recipient to defend the receipt either by a change of position or perhaps in some other way. Moreover, if the circumstances of the receipt are such as to make

- A it unconscionable for the recipient to retain the benefit of it, there is an obvious difficulty in saying that it is equitable for a change of position to afford him a defence.¹¹

Liability Of D2

- B [40] The first element of knowing receipt that the plaintiff needed to prove is not in dispute. I find that there has been a breach of trust by D1 that resulted in the disposal of the plaintiff's money, which breach has in fact resulted in a custodial sentence being imposed on D1.

- C [41] While it was also not disputed that D2 had received money that was traceable to the plaintiff, the question that arises is whether D2 had received such money in a beneficial capacity, or whether she was merely a conduit through whom D1 routed the money. Based on the evidence at trial, each time a cheque of the plaintiff was paid into D2's account, D4 would, within a day or two thereafter, withdraw a corresponding amount in cash.

- D [42] The distinction is significant because, if D2 had not received the money beneficially, but merely in a ministerial capacity, the plaintiff will need to prove dishonesty on the part of D2, which is a higher standard of fault, and establish liability for dishonest assistance of a breach of trust: see the decision of English Court of Appeal in *Uzinterimpex JSC v. Standard Bank plc*¹² and *Snell's Equity* at paras. 30-069, 30-075 and 30-076¹³.

- E [43] I find that, on the facts, there was beneficial receipt by D2 of the plaintiff's money for the reasons that will become clear in the following paragraphs.

- F [44] The third element relates to the state of mind of D2. The question is whether it was unconscionable for her to have remained in possession of the plaintiff's money.

- G [45] D2 by her own evidence described the scheme as "illegal", "tantamount to embezzlement of funds", "money laundering" and a "scam". Even if I were to accept her testimony that she was an unwilling participant in the arrangement, the fact remains that she clearly considered that what D1 and D4 were doing was an unlawful enterprise, and she permitted her account to be used not once, not twice, but a total of eighteen times. While she maintained that she had each time demanded D4 to desist, but the reality was that the scheme continued unabated until it was finally unravelled in December 2013.

- H [46] On this basis alone, I find that the conduct of D2 was unconscionable and that D2 was in knowing receipt of money belonging to the plaintiff that had been transferred to her in breach of trust.

- I [47] However, I also find that the culpability of D2 extended beyond her assertion that she was merely an unwilling participant, for the reasons set out in the following paragraphs.

[48] Before the trial began, the plaintiff discovered another cheque (in addition to the 18 previously discovered) for an amount of RM20,800 which was made out to and paid into the account of D2 in April 2013. D2 had not drawn the attention of the parties to the existence of this cheque in her defence, which is an omission that this court considers material, and which is not consistent with the conduct of someone who had innocently received money. If, as contended by D2, she was an entirely innocent party, it would not be unreasonable to expect her to have drawn the attention of the plaintiff to the existence of this additional cheque prior to the commencement of the trial.

[49] This called into question the credibility of her testimony as a whole.

[50] In her answer to question 21 in her witness statement, D2 stated that D4 had informed her that the money was paid through D2's WTL Marketing account to pay a supplier to D4's friend's company. We know from D4's testimony that D4's friend here referred to D1 and that the company was the plaintiff. In her testimony, D4 gave evidence that D1 wanted to help a bankrupt supplier to the plaintiff. This bankrupt supplier was not called to testify in court.

[51] Yet in her answer to question 28, D2 testified that D4 told her that D4 would return the money "to the original source which I believe was allegedly the fourth defendant's friend's company". Payment invoices were issued to support the issuance of cheques by D2 and these invoices stated that the payment were refunds for money that had been wrongly banked in into the WTL Marketing account.

[52] The question ought to have arisen in D2's mind, as it would have in the mind of any right-thinking and honest person: which was it, was the money to pay a bankrupt supplier or was it being refunded to the plaintiff? There is no evidence before me that D2 had asked D4 this question, and the inconsistency in her testimony remained unresolved.

[53] There is no doubt in my mind that the bankrupt supplier did not in fact exist. The real question is however whether D2 was an innocent participant in the scheme who believed what she had been told by D4 (and that D4 in turn had naively believed what she had been told by D1).

[54] Even if the defendants' story of the bankrupt supplier were true, it does not explain why the cheques had to be routed into D2's bank account. Why couldn't D1 simply prepare a cash cheque to be drawn against the plaintiff's account, and then deliver the cash to the supplier?

[55] A further inconsistency arose in cross-examination, when the counsel for the plaintiff asked D2 whether the large amounts (which ranged up to RM48,000) that had been paid out of her WTL Marketing account had put her on inquiry. D2 twice answered "No". Yet in other parts of her testimony she described the arrangement variously as illegal, money-laundering, an

A embezzlement and a scam. It appears by her own evidence that she was consternated by the use of her account for unlawful purposes and yet she was strangely sanguine about the large amounts that had been paid into her account.

B [56] D2 acknowledged that she had cancelled the “account payee” endorsement on the cheques that she had signed in favour of D4. The evidence of D4 was that she cashed the cheques at the CIMB bank located Sri Damansara and then carried the cash to the office of D1, accompanied by an acquaintance called Nizaruddin, who like the bankrupt supplier was not called to testify. The cash withdrawn by D4 in one instance exceeded
C RM100,000, which was an extraordinarily large amount of money to be carrying around. Needless to say there would be risks associated with carrying such large amounts of cash, which begs the question why someone would do such a thing, unless the rewards outweighed the risks.

D [57] If indeed there was a bankrupt supplier to be paid, it would have made more sense for the money to be paid into a bank account and withdrawn from the bank in the presence of the supplier so that the money could be delivered without the attendant risks of ferrying a large amount of cash in a public place.

E [58] Considering the totality of the evidence I find that that I am unable to accept D2’s account of events. I caution myself that I am not concerned here with the honesty or credibility of D4 as a witness, but with the issue of whether the conduct of D2 at the material time fulfils the requirements of dishonesty as laid out by Lord Nicholls in *Royal Brunei Airlines v. Tan* and clarified in *Twinsectra*. Having objectively evaluated the conduct of D2 in
F the context of the factual circumstances that are not in dispute, I am of the view that D2 has dishonestly assisted in the breach of trust that resulted in the disposal of the plaintiff’s money.

[59] In summary:

- G (a) The conduct of D2 was unconscionable and that D2 was in knowing receipt of money belonging to the plaintiff that had been transferred to her in breach of trust;
- H (b) Even if D2 was merely a conduit and had received the money in a ministerial capacity, rather than beneficially, her conduct was nonetheless dishonest rendering her liable to account for the plaintiff’s money that had been transferred into her WTL Marketing account; and
- I (c) The fact that the money had been withdrawn from D2’s WTL Marketing account is immaterial, as she cannot avail herself of the change of position defence for the reasons set out in para. 39(d), *ante*. I distinguish *Ooi Meng Khin v. Amanah Scotts* on the facts, on the basis that in that case the Court of Appeal found that the seventh defendant did not have the requisite state of knowledge for liability for knowing receipt to attach.

Liability Of D3

[60] D3, it will be recalled, is the daughter of D4. D3 owned a sole proprietorship registered as QX Marketing. QX Marketing was registered on 19 September 2013, well after D1 had started siphoning the plaintiff's funds.

[61] It was not disputed in evidence that a cheque for the amount of RM22,000 was paid into D3's account in the name of QX Marketing. This cheque, dated 13 December 2013, was drawn on the plaintiff's account. It was this cheque that uncovered the D1's scheme to defraud the plaintiff. On 16 December 2013, Mr Rampling, the managing director of the plaintiff, received a telephone call from the plaintiff's bank seeking to verify the cheque. Not being familiar with the identity of the payee QX Marketing, he first checked with D1, who told him that a supplier had requested for payment to be made directly to a sub-supplier. Mr Rampling did not have reason to doubt this explanation and provided confirmation to the bank on the issuance of the cheque to QX Marketing.

[62] He nonetheless requested further details from D1 regarding the supplier who had made the request for direct payment, but the information was not forthcoming from D1 for three days. By then, Mr Rampling's suspicions were aroused, prompting him to check the accounting records of the plaintiff, which was when he discovered that there was no such amount owing to any supplier of the plaintiff. Mr Rampling and Mr Stephen Koh, a fellow director of the plaintiff company, then confronted D1, who confessed to her theft of the RM22,000, but did not reveal the extent of her prior fraud. Mr Rampling and Mr Koh demanded for the return of the RM22,000.

[63] Mr Koh accompanied D1 to CIMB Bank located in Bandar Sri Damansara, where they met D3 and D4. D3 issued a cash cheque to withdraw the sum of RM22,000 from her account, which was then remitted back into the account of the plaintiff.

[64] It was not disputed that D3 had not received any amount other than the RM22,000, and that this money had been returned to the plaintiff on 19 December 2013. Accordingly, there is no question of D3 being a constructive trustee for the amount of RM22,000. There is no longer any property of the plaintiff that is in the possession of D3 that can be made the subject of a trust.

[65] Whether D3 can be made a constructive trustee of the amount of RM795,372.72 that had been transferred into the account of D2 is dependent on two issues:

- (a) Whether D3 had dishonestly assisted in the breach of trust in respect of the amount of RM795,372.72 that was stolen by D1; and
- (b) Whether D3 had conspired with the other defendants in defrauding the plaintiff. The liability of D3 for conspiracy is considered at para. 73 *et seq.*, post.

- A [66] I find that there is no evidence that D3 had dishonestly assisted in the breach of trust relating to the amount of RM795,372.72. Even though D3's QX Marketing account was used for the purpose of receiving the money that was paid through the 13 December 2013 cheque, this fact is not relevant for the purposes of determining liability in respect of the amount of
- B RM795,372.72. Indeed, there is no evidence that D3 was even involved in the prior fraud involving D2's WTL Marketing account.

Conspiracy

[67] The ingredients of the tort of conspiracy are as follows:

- C (a) There is an agreement between two or more persons;
- (b) Such agreement is for the purpose of injuring or defrauding the plaintiff; and
- (c) The acts done in execution of that agreement resulted in damage to the plaintiff.¹⁴
- D

[68] In the present case, the plaintiff alleged that the defendants had conspired to defraud the plaintiff. The standard of proof where conspiracy to defraud is alleged is the same as where fraud is alleged.¹⁵ Accordingly, the plaintiff must prove its case beyond a reasonable doubt.

- E [69] The plaintiff's case against D1 and D4 is proven, as neither entered an appearance before this court.

Liability Of D2

- F [70] The remedy sought by the plaintiff against D2 for conspiracy to defraud is the same as that sought in respect of knowing receipt. As such, it is not strictly necessary for me consider the issue of conspiracy against D2, as I have found D2 liable for having knowingly received money belonging to the plaintiff and liable to account as a constructive trustee to the plaintiff for the money that had been paid into her WTL Marketing account.
- G [71] Nonetheless, I find that D2 had conspired with D4 to defraud the plaintiff. The inconsistencies in D2's testimony, discussed at paras. 50 to 55 *ante*, lead me to the inescapable conclusion that there must have been an agreement between D2 and D4 to use the WTL Marketing account in order to siphon away funds of the plaintiff. Counsel for D2 offers in argument the exculpatory testimonies from D2 herself, and that from D4. However, I have found that D2's testimony to be unreliable (see paras. 48 and 49 *ante*). D2 maintained that she had asked D4 not to use the WTL Marketing account for purposes that she herself described as illegal, money-laundering, an embezzlement and a scam. Yet she still repeatedly and persistently permitted
- H her account to be used no less than 18 times over a period of some seven and half months. In this time, D2 wrote 27 cheques in favour of D4, supposedly under protest – a proposition that I am not able to accept as being representative of the truth.
- I

[72] I also find that D4's testimony to be similarly unreliable. The story of the bankrupt supplier is simply an *ex post facto* construct of D4 designed to explain the need to issue a cheque with the account payee endorsement cancelled. As I have pointed out in para. 56 *ante*, no reasonable person would withdraw over RM100,000 in cash, and carry this extraordinarily large sum of money in public unless the rewards were worth the attendant risks. If D4's account were to be believed, she did so out of the goodness of her heart to aid a bankrupt supplier to a company of which her friend, D1, was an employee. The reality was that the money was withdrawn in cash not to pay a bankrupt supplier as alleged by D4, but as a means of breaking the money trail and to aid the dissipation of the plaintiff's money. For these reasons, I consider that the evidentiary value of D4's testimony to be negligible, and that accordingly her statements that exculpated the involvement of D2 in the conspiracy are not to be given any weight at all.

Liability Of D3

[73] The plaintiff's case against D3 is largely circumstantial and may be summed up as follows. D3 is the daughter of D4, and had registered QX Marketing as a business on 19 September 2013. The business of QX Marketing was to sell baby products. However, during cross-examination, D3 was very hesitant to answer even the most basic questions about the products that her business sold. The plaintiff alleged that QX Marketing was registered solely for the purpose of siphoning money belonging to the plaintiff.

[74] Counsel for D3 pointed out the fact that the chequebook for QX Marketing was kept by D4, which suggested that D4 was the actual person in control of the QX Marketing account.

[75] Having observed the demeanour of D3 on the witness stand, I agree with the observation of the counsel for the plaintiff that she was very hesitant to answer questions to which she ought to have known the answers. However, it must be remembered that D3 was only 19 years old at the time of the trial, and her demeanour may be explained by any number of reasons, not least by the fact that she may have been overcome by nerves by the seriousness and gravity of the occasion.

[76] Taking into account the totality of the evidence before me, I find that the plaintiff has not proven its case against D3 for conspiracy to defraud beyond reasonable doubt.

Vicarious Liability

[77] The next issue for consideration is whether D2 ought to be made liable for the acts of her employee, D4, on the principle of vicarious liability.

[78] In my view, the question of vicarious liability of D2 is only relevant had I found D2 not liable as a co-conspirator of D4. As D2 is already liable as principal to the plaintiff, the issue of her liability for the acts of D4 does not arise.

A Contributory Negligence

[79] Counsel for D2 and D3 argued that the plaintiff ought not be entitled to seek redress against D2 and D3 for losses attributable to the negligence of the plaintiff's directors. She argued that the plaintiff had put D1 in a position of responsibility very shortly after she had joined the company, and that the plaintiff employed the practice of pre-signing cheques, both of which contributed to the losses suffered by the plaintiff.

[80] Counsel for D2 and D3 cited a number of cases in support of her proposition that the holder of a bank account must refrain from drawing a cheque in a manner as to facilitate fraud or forgery.

[81] However, all these cases dealt with the banker-customer relationship. It is indeed a duty of a customer to his or her bank not to operate his or her account in manner as will facilitate a fraud. The cases cited all involved suits between banks and their customers for frauds committed against the customers' account held at the banks. In each case, the bank sought to deny or limit its liability on the basis of the poor internal controls employed by the customer that had provided the opportunity for the fraud to occur.

[82] In the present case, the plaintiff is not suing its bank, but the persons whom it alleged to have perpetrated the fraud. Accordingly, the cases cited are inapplicable to the facts of the case at hand, and the issue of negligence on the part of the directors of the plaintiff is not relevant. It would be a surprising result indeed if a thief could escape liability simply by claiming that the victim was wrong to have laid the temptation before him.

Decision

[83] For the reasons set out above, I find and order as follows.

[84] As against D1, I find her liable for fraud, conspiracy, breach of duties as an employee of the plaintiff, breach of trust and breach of her fiduciary duties owed to the plaintiff, and order:

- (a) An injunction preventing her from selling, dissipating, transferring, charging or otherwise dealing in any of her assets wherever located until satisfaction of this judgment;
- (b) That D1 discloses to the plaintiff the value of all her assets wherever located by way of a sworn affidavit filed in this court;
- (c) That D1 pays to the plaintiff RM37,635.51 (being the amount of petty cash missing from the accounts of the plaintiff) with interest at a rate of 4% per annum from 19 December 2013 until 24 February 2015, and at a rate of 5% per annum thereafter until full satisfaction of the judgment debt;
- (d) That D1 pays to the plaintiff RM8,000 for abandoning her employment with the plaintiff, with interest at a rate of 4% per annum from 19 December 2013 until 24 February 2015, and at a rate of 5% per annum thereafter until full satisfaction of the judgment debt;

(e) That D1 jointly and/or severally with D2 and D4 pays to the plaintiff RM795,372.72; A

(f) That D1 pays general damages to the plaintiff in an amount to be assessed; and

(g) That D1 pays costs of RM20,000 to the plaintiff. B

[85] As against D2, I find her liable:

(a) to account to the plaintiff as constructive trustee for the amount of RM795,372.72 for having knowingly received such sums belonging to the plaintiff; and C

(b) liable, together with D4, for conspiracy to defraud the plaintiff in the amount of RM795,372.72,

and I further order:

(c) An injunction preventing her from selling, dissipating, transferring, charging or otherwise dealing in any of her assets wherever located until satisfaction of this judgment; D

(d) That D2 discloses to the plaintiff the value of all her assets wherever located by way of a sworn affidavit filed in this court;

(e) That D2 jointly and/or severally with D1 and D4 pays to the plaintiff RM795,372.72; E

(f) That D2 pays general damages to the plaintiff in an amount to be assessed; and

(g) That D2 pays costs of RM20,000 to the plaintiff. F

[86] As against D4, I find her liable:

(a) To account to the plaintiff as constructive trustee for the amount of RM795,372.72 for having knowingly received such sums belonging to the plaintiff; and G

(b) Liable, together with D2, for conspiracy to defraud the plaintiff in the amount of RM795,372.72,

and I further order:

(c) An injunction preventing her from selling, dissipating, transferring, charging or otherwise dealing in any of her assets wherever located until satisfaction of this judgment; H

(d) That D1 discloses to the plaintiff the value of all her assets wherever located by way of a sworn affidavit filed in this court;

(e) That D4 jointly and/or severally with D1 and D2 pays to the plaintiff RM795,372.72; I

A (f) That D4 pays general damages to the plaintiff in an amount to be assessed; and

(g) That D4 pays costs of RM20,000 to the plaintiff.

B [87] In respect of the sums referred to in paras. 84(e), 85(e) and 86(e) *ante*, I further order interest on the amounts of each cheque at a rate of 4% per annum from the date of the respective cheques until 24 February 2015, and at a rate of 5% thereafter until full satisfaction of the judgment debt.

[88] I dismiss the plaintiff's claims against D3 with no order as to costs.

C **Endnotes:**

1. [1991] 2 AC 548 at p. 559E
2. [1986] 1 LNS 30; [1987] 2 MLJ 57, at (MLJ) p. 65
3. *Snell's Equity*, 33rd Edition (2015)
- D 4. [1986] 1 LNS 46; [1987] 1 MLJ 393
5. [1980] QB 485
6. [2001] Ch 437 at p. 455F (Court of Appeal)
7. [2014] 1 LNS 719; [2014] 6 MLJ 488
- E 8. [1995] 2 AC 378 (Privy Council)
9. [2002] 2 AC 164 at para. 36 (House of Lords)
10. [1994] 2 All ER 685 at p. 700
- F 11. *Op. cit.* at p. 456D-F
12. [2008] Bus LR 1762 at paras. 38 and 39
13. *Op. cit.*, footnote 3
14. per RK Nathan J in *Simmah Timber Industries Sdn Bhd v. David Low See Keat & Ors* [1999] 5 MLJ 421
- G 15. Per Gopal Sri Ram JCA in *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case* [1995] 3 CLJ 639 at p. 658

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